IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1885 of 2004
with
CIVIL APPLICATION NOS. 2112 OF 2004 and 1250 OF 2004

For Approval and Signature:

HON'BLE MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SUDESH R GUPTA

Versus

PANCHSHEEL MERCANTILE CO-OP BANK LTD

Appearance:
1. Special Civil Application No. 1885 of 2004
DR SONIA HURRA for Petitioner No. 1-3
MR A.J. PATEL, FOR MR. RAVINDRA SHAH for Respondent No. 1
UNSERVED-REFUSED (N) for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE K.M.MEHTA

Date of decision: 6 /7 /2004

C.A.V. JUDGEMENT

1. Shri Sudesh R. Gupta and others, petitioners, have filed this petition challenging the order dated 13.1.2004 passed by the Gujarat Co-operative Tribunal, Ahmedabad in Revision Application No. 17 of 2004. The Tribunal by its impugned order was pleased to partly allow the application and directed the applicant therein to pay 33.5% amount within one month before the Board of Nominee and thereafter the applicant will have leave to defend.

2. The relevant facts giving rise to this petition are as under:

PRESENT CONTROVERSY:

3. It may be noted that respondent No. 1 (original plaintiff) Bank has filed Civil Suit No. 54 of 2003 against the present petitioners under Section 96 read with Section 99(4) of the Gujarat Co-operative Societies Act, 1961. In the plaint it is the case of the bank that defendant No. 1 who is member of the society had taken loan of Rs. 10 (ten) lakhs and they have to pay interest at the rate of 18%. The present petitioner also gave promissory note dated 31.3.1994 and had also pledged their goods and also entered into an agreement. The petitioners have also given securities and also created lien in this behalf. They have paid certain amount on 21.10.1997. Thereafter, the bank had issued a notice dated 3.8.1998. In view of the aforesaid position bank has filed present suit on 21.1.2003 claiming Rs. 34,97,067/- as on 31.7.2002 and interest at the rate of 18% on the said amount till payment.

3.1 In the suit the original defendants, present petitioners, filed reply at Exh. 23 and Exh. 36. In the said reply, the petitioners raised a contention that the Board of Nominees has no jurisdiction in view of the Full Bench judgement of the Mumbai High Court in Writ Petition No. 2376 of 2002 in the case of M/s. Maytag Udyog P. Ltd. Vs. State of Maharashtra & Ors. decided on 12.12.2003 wherein the Full Bench of Mumbai High Court (Coram: C.K. Thakkar, CJ (as he was then) and D.K. Deshmukh and S.J. Vazifdar, JJ) (since reported in AIR 2004 Bom. 166), had held that from the date on which the Debts Recovery Tribunal was constituted under the DRT Act, 1993, the Courts and authorities under the 1960 Act as also 2002 Act (i.e. Co-operative Societies Act) would cease to have jurisdiction to entertain the applications submitted by the Co-operative Banks for recovery of their dues, meaning thereby after the establishment of Debt Recovery Tribunal all the disputes relating to recovery of debts due to banks / co-operative banks and financial

institutions only DRT will have exclusive jurisdiction.

3.2 The respondent further contended that Shri Ram Avatar Gupta and Shri Anand S. Gupta, original defendants and petitioner Nos. 2 and 3 respectively, purchased company named M/s. Veenutax Dyeing and Printing Mills Pvt. Ltd., in 1995. Thereafter, they suffered losses and ultimately they sold the entire shares of M/s. Veenutax Dyeing & Printing Mills Pvt. Ltd. to Mr. C.R. Patil, respondent No. 2 herein for Rs. 4.31 crores. Out of the said amount payable to petitioners by Mr. C.R. Patil, the petitioners settled dues of G.S.F.C.; G.I.I.C.; and respondent bank as one time settlement. It is the case of the petitioners original defendants that out of the purchase amount of M/s. Veenutax Dyeing & Printing Mills Ltd. by Mr. C.R. Patil, Mr. C.R. Patil has paid to the respondent bank for an on behalf of the petitioners an amount of Rs. 94,30,000/- in three instalments on or about 2.7.1998, 10.7.1998 and 11.7.1998 and therefore the petitioners have not to pay anything. The petitioners have also raised a contention that the suit is barred by limitation.

3.3 The Board of Nominee, thereafter heard the matter and by its judgement and order dated 29.12.2003 rejected the application and refused to grant leave to defend. The preliminary issue raised by the petitioners at Exh. 23 has also been rejected. The Board of Nominee has considered the provisions of the Co-operative Societies Act.

3.4 Being aggrieved and dissatisfied with the said judgement of the Board of Nominees the petitioners have filed Revision Application No. 17 of 2004 before the Co-operative Tribunal and the Tribunal by its judgement and order dated 13.1.2004 was pleased to reject the said Revision Application. However, the Tribunal has only modified that if the applicant pays 33.5% of the dues within one month then leave to defend is granted.

3.5 Being aggrieved and dissatisfied with the said judgement and order the petitioners have filed the present petition before this Court challenging the aforesaid orders of the authorities below. The learned counsel for the petitioners have relied on Section 99 of the Co-operative Societies Act which provides procedure for settlement of dispute and power of Registrar, his nominee or board of nominees.

CONTENTION OF THE LEARNED COUNSEL FOR THE PETITIONERS -

ORIGINAL DEFENDANTS:

3.7A The learned counsel for the petitioner stated that in this case the plaintiff (respondent bank) has filed suit on the basis of the agreement of 1997 and 1998. As regards Civil Suit No. 54 of 2003 the plaintiff claimed Rs. 34,97,000/-. The suit has been filed after 5 years i.e. on 21.1.2003. Against that the petitioners original defendants have filed reply before the Board of Nominee. In that case Exh. 23 and other, defendants raised contention that the plaintiff is not entitled to file summary suit.

3.7B The learned counsel for the petitioners stated before the Board of Nominee that somewhere in May 1998 petitioner Nos. 2 and 3 sold the entire shares of M/s. Veenutax Dyeing and Printing Mills Pvt. Ltd. to Mr. C.R. Patil, respondent No. 2. Out of the said amount, Mr. C.R. Patil settled the dues of G.I.I.C., G.S.F.C. and respondent Bank as one time settlement in June, 1998. Thereafter one time settlement of Rs. 1.11 crores was paid to GIIC from M/s. Veenutax Dyeing and Printing Mills Ltd., by C.R. Patil for and on behalf of the petitioners. From 2.7.1998 one time settlement of Rs. 94,30,000/- paid to respondent bank from M/s. Veenutax Dyeing and Printing Mills Pvt. Ltd. by C.R. Patil for and on behalf of the petitioners. Even Rs. 28 lakh was paid to GIIC on 31.8.1998. It has been stated on 2.7.1998 Rs. 60 lakh was paid and on 10-7-1998 Rs. 30 lakh was paid and on 11.7.1998 Rs. 4.30 lakh was paid in all RS. 94,01,017/- was paid to the respondent bank.

3.7-C The learned counsel for the petitioners has invited my attention to the extract of the books of accounts of Panchsheel Mercantile in which Veenutax Dyeing and Printing Mills Pvt. Ltd. primary account has been shown from as on 1.4.1998 to 31.3.1999 in which it has been stated that on 2.7.1998 the bank received Rs. 60 lakh and on 10.7.1998 Rs. 30 lakhs and on 11.7.1998 Rs. 4.30 lakhs which is produced on page 45 of the paper book. The learned counsel for the petitioners has also invited my attention to other documents of Panchsheel Mercantile Co-operative Bank Ltd where also it has been stated that the bank has received some amount which is on pages 47 and 48.

3.7D The petitioners had addressed a letter dated 9.1.2004 to the bank in which the petitioners requested that Veenutax Dyeing and Printing Mills Pvt. Ltd., Shree Shiv Textiles, Shiv Enterprises, have not paid certain amounts but Veenutax Dyeing and Printing Mills Pvt. Ltd.

paid the same on their behalf and they requested the extract of bank account from 30.7.1998. That letter is produced on page 64 of the paper book. On 12.1.2004 the bank only stated that as the matter is subjudice they are not able to give any response in this behalf. The petitioners have filed a separate Civil Application being Civil Application No. 1251 of 2004 in which the extract from the Board Meeting of Veenutax Dyeing & Printing Mills Pvt. Ltd. has been produced where authority has been given to Shri Ram Avtar Gupta or Shri Anand Swaroop Gupta to act on their behalf. One of the terms and conditions that purchase consideration of Rs. 431.00 lacs is agreed between the vendors and purchasers. In the extract of Panchsheel Bank the account of Veenutax & Printing Mills Pvt. Ltd. has been shown.

3.7-E In view of the aforesaid facts and circumstances of the case, the learned counsel for the petitioners have stated that petitioners - original defendants have raised the contention of limitation, contention regarding jurisdiction and also on the merits of the matter. The petitioners have raised triable issue and therefore petitioners/original defendants are entitled to unconditional leave to defend. The learned counsel has further submitted that the Court has not properly exercised its discretion while imposing condition as to the payment in view of the judgement of the Hon'ble Supreme Court which has been referred to hereinafter.

3.7-F The learned counsel for the petitioners therefore submitted that in this case though the petitioners who had defendants raised substantial question of jurisdiction and also payment of entire amount. The Board of Nominee as well as the Tribunal has not considered this case and the Tribunal has imposed the condition that the petitioners are directed to pay 33.5% of the claim made by the plaintiff and only on that condition leave to defend has been granted to the petitioners.

3.7G The learned counsel for the petitioners has relied on the amended Section 99 of the Societies Act particularly sub-Sections (4) to (6) of the said Section. The learned counsel submitted that the said Section provides summary procedure for filing the suit.

3.7H The learned counsel for the petitioners relied on Order 37 of Code of Civil Procedure Order 37 Rule 1 provides the Courts and classes of suits to which the Order is to apply. Order 37 Rule 2 provides institution of summary suits. Order 37 Rule (3) provides for

procedure for the appearance of defendant. Order 37 Rule 4 provides for power to set aside decree. Order 37 Rule 5 provides for power to order bill etc. to be deposited with officer of Court. Order 37 Rule 6 provides for Recovery of cost of noting non-acceptance of dishonoured bill or note. Order 37 Rule 7 provides for procedure in suits. The learned counsel for the petitioners therefore submitted that Section 99 of the Co-operative Societies Act and Order 37 Rule 3 of the Civil Procedure Code (hereinafter referred to as "C.P.C.") are in pari materia and therefore whatever principle laid down in Order 37 of the C.P.C. the same will be applicable in connection with Section 99 of the Act.

3.7-I As regards Order 37 Rule 3 of the C.P.C. the learned counsel for the petitioners has relied on the following decisions:

3.7J The learned counsel for the petitioners submitted that the principle regarding grant of leave had been set out by the Hon'ble Supreme Court in the case of Mechalec Engineering & Manf. Vs. Basic Equipment Corporation reported in AIR 1977 SC 577. In para 8 (on page 580) after relying upon the decision of the Calcutta High Court in the case of IN SM. KIRANMOYEE DASSI V. DR. J. CHATTERJEE (1945) (49 CAL WN 246 at p. 253) the Hon'ble Supreme Court has laid down the following principles:

"(a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgement and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgement and the defendant is entitled to unconditional leave to defend.

(c) if the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgement and the defendant is entitled to leave to defend but in such a case

the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgement and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgement the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

3.7K The learned counsel for the petitioners submitted that this order of the Tribunal is contrary to and inconsistent with the order of the Hon'ble Supreme Court in the aforesaid cases as well as certain other cases which lay down similar principles and therefore this Court may be pleased to quash and set aside the order of the Tribunal as well as Board of Nominees and direct the Board of Nominees to hear the suit afresh without imposing any condition.

3.7L The learned advocate for the petitioners very vehemently submitted that this Court may transfer the existing proceeding before the D.R.T. in view of the Full Bench judgement of Mumbai High Court which I have referred earlier. The learned counsel also submitted that this Court may quash and set aside the orders of the Board of Nominees as well as the Tribunal as the petitioners have paid all the amounts due to the Bank.

CONTENTIONS OF THE LEARNED COUNSEL FOR THE RESPONDENT ORIGINAL PLAINTIFF:

4. On the other hand, Mr. A.J. Patel and Mr. Ravindra R. Shah, learned counsel for the respondents has submitted as under:

4.1 The learned counsel for the respondent along with Mr. Ravindra Shah submitted that in this case the Tribunal has considered the entire case. The learned counsel for the respondents stated that in this case the

Tribunal has passed discretionary order of depositing 1/3rd of the amount dues particularly when the petitioners were not able to show any satisfactory evidence in their favour that they have paid the amounts. It is the case of the respondents that as per the order of the Hon'ble Supreme Court in the case of Mechalec Engineering & Manf. Vs. Basic Equipment Corporation (supra) as per clause (e) in the said judgement once there was no documentary evidence, the defence raised by the defendant was illusory or sham or practically moonshine, both the Courts directed defendants to pay some amount or otherwise secured and give leave to the defendant on such condition. The learned counsel for the respondents has submitted that thus the Tribunal has passed discretionary order and this Court may not interfere with the said order under Article 26/227 of the Constitution. In support of the same, the learned counsel has relied on the judgement of this Court in the case of KHALID IBRAHIM BEG AND ANR. VS. STATE BANK OF INDIA reported in 20 GLR 525. The learned Single Judge (B.K. Mehta, J) has considered the provisions of Order 37 Rules (1), (2) and (5) of C.P.C. where on page 531 the Court has observed as under:

"Reading the main enactment together with the first proviso, I am of the opinion that so far as the first two situations are concerned, the job of the Court is not difficult. In a case where there is a substantial or a good defence the Court must grant, as a matter of course, leave to defend the suit. In a case where the defence is patently frivolous or vexatious and the Court is satisfied about it, it would refuse to grant leave. The role of the Court becomes difficult only in those cases where there is a disclosure of probable defence which may be made good if an opportunity is given to the defendant to substantiate his case. It is in this gray area that the discretion of the Court is to be regulated by known and recognised principles."

4.1A On page 532 of the said judgement, the Court further observed thus:

"It is no doubt true that the object of rational underlying Order 37 is to try those suits specified more particularly in rule 1 in a summary manner, so that the trial of the commercial causes may not be delayed or obstructed by such dishonest defendant trying to raise frivolous or vexatious defence or by

> offering virtually an apology of defence. The first proviso, therefore, circumscribes the discretion where the Court is satisfied that there is no defence whatsoever or the defence is false or frivolous. Where the Court finds that there is a substantial defence, it is obligatory on the court to grant leave unconditionally. When the Court finds that there is a defence in the sense of a triable issue having been raised the Court shall exercise its discretion to grant leave conditionally or unconditionally. The concept of a triable issue is well known, recognized and clearly enunciated. The triable issue may be about want of consideration, execution, want of legality or formality of the execution of document or want of compliance of mandatory obligation of the statute etc. This list is not exhaustive and it will depend on the facts and circumstances of each case, whether the facts disclosed by affidavits or otherwise raise a triable issue, and the Court has to, in every given case before it, examine the facts so disclosed by the defendant with its large experience and robuts common sense, whether a triable issue has been raised or not. It should, however, be borne in mid at that stage when the Court is considering whether there is a triable issue or not that the Legislature has by the first proviso circumscribed the power of the Court to refuse to grant leave only on being satisfied that there is a no substantial defence or it is frivolous or vexatious. In other words, till that satisfaction is reached, the Court is not entitled to refuse to grant leave. The Court has also to bear in mind the second proviso which prescribes that no leave shall be granted without the defendant depositing the admitted claim of the plaintiff. It is in this background, therefore, that I have to find out whether the discretion exercised by the trial Court was erroneous on matter of principles."

4.2 Relying upon the aforesaid judgement, the learned counsel for the respondents stated that both the trial court as well as the appellate court have imposed condition of depositing 33% of the amount and this Court under Article 226/227 of the Constitution may not interfere in this regard. The writ petition is, therefore, required to be rejected.

4.3 The learned counsel, has submitted that in this

case both the Board of Nominees and the Tribunal have rejected the preliminary objection. It has been stated that before the Board of Nominee the petitioners have not raised any contention in support of the same. Even the Tribunal in Appeal No. 17 of 2003 where specific evidence regarding payment of one time settlement was not produced by the petitioners. There is no resolution passed by the bank. Only computerised records have been produced but nothing has been produced. In view of the same the Board of Nominee has rejected the contention of the petitioners. However, 1/3 rd of the amount has to be paid by the petitioners.

4.4 The learned counsel for the respondent stated that the learned counsel for the petitioners has relied on Full Bench judgement of the Mumbai High Court. It is no doubt true that Full Bench has held that DRT has jurisdiction. However, he submitted that being aggrieved and dissatisfied with the said judgement some of the persons have filed Special Leave Petition before the Hon'ble Supreme Court and the Hon'ble Supreme Court has granted stay. He further submitted that there is a conflict of opinions on this point amongst various High Courts. Rajasthan High Court has taken a contrary view and the matter is pending before the Hon'ble Supreme Court. Till the Hon'ble Supreme Court decides the matter finally, the Co-operative Tribunal will have jurisdiction. It may be noted that he has further stated that the bank has also filed rejoinder at Exh. 31 and categorically stated that whatever arrangement/agreement arrived at between the defendants and Mr. C.R. Patil, the bank was not a party to the same and therefore, whatever arrangement/agreement arrived at between the defendants and Mr. C.R. Patil is not binding on the bank and in fact the bank has not received any amount in this behalf.

4.5 It may be noted that respondent bank has neither filed any reply to the main petition nor replied to the Civil Application filed by the defendants-petitioners.

CONCLUSION:

5. I have considered the contention raised by the petitioners - original defendants and the respondent bank original plaintiff. I have also considered the orders passed by the Board of Nominees as well as the Tribunal. The Board of Nominees as well as the Tribunal has held that the defendants have not paid any amount to the bank. The defendants have not been able to produce any evidence to show that the defendants have paid the amount to the

bank. The defendants have stated that pursuant to the settlement which has been entered into between the defendants and Shri C.R. Patil, Shri C.R. Patil has paid the amount to the bank on behalf of the defendants. However, there is no evidence to show that Shri C.R. Patil has paid anything to the bank on behalf of the defendants. It is the case of the defendants that they have sold M/s. Veenutax Dyeing and Printing Mills Pvt. Ltd. to Shri C.R. Patil and it was agreed between them that Shri C.R. Patil will pay the amount to the bank on behalf of the defendants. There is no agreement or arrangement arrived at between the plaintiff bank, Shri C.R. Patil and the defendants. The only arrangement arrived at is between the defendants and Shri C.R. Patil. The bank was not a party to it. The plaintiff bank has categorically stated that it has not received any amount. In view of the same, prima facie, it appears that the contention of the defendants that they have paid amount to the bank does not seem to be correct on the record of the case.

5.A I have also considered the submission of the learned counsel for the petitioner regarding transfer of the cases to D.R.T. However, in the facts and circumstances of the case against the Full Bench judgement of the Mumbai High Court the appeal is filed before the Hon'ble Supreme Court and the Hon'ble Supreme Court has granted stay and the matter is at large before the Hon'ble Supreme Court. In view of the same, it will not be possible for this Court to accept the contention of the petitioners at this stage.

5.1 Moreover, both the Board of Nominees as well as the Tribunal have decided that in absence of evidence the defendants should pay 33.5% of the amount and on payment of the same leave to defend is granted. Both Board of Nominees and the Tribunal have passed discretionary order and exercised judicial discretion in passing the said order. I, therefore, do not see any illegality or infirmity or any jurisdictional error in the order passed by them. In view of the same and in the light of the judgements cited by the respondent-plaintiff bank that once the judicial discretion has been exercised by the authorities this Court may not under Article 226/227 of the Constitution, interfere with the order of authorities. I fully agree with the said submission and I do not find any reason to interfere with the said discretionary order passed by the authorities.

5.1A I have also to consider the balance of convenience. On the one hand there is private party and

on the other hand there is bank where the Court is concerned with public money. In view of the same, I do not see any reason to interfere with the order of Board of Nominees and Tribunal imposing condition of 33.3% of the payment.

5.2 I have not decided the points regarding jurisdiction and limitation and it will be open for the defendants to raise these points before the authority/Tribunal and the authority will decide the same in accordance with law because unfortunately the authority has not given any finding both on the point of jurisdiction as well as limitation. In view of the same, it will be open for the Tribunal to decide the same in accordance with law if such contentions raised before them.

6. In the result, the petition is rejected accordingly. Interim relief granted by the order dated 13.2.2004 is vacated. Rule is discharged with no order as to costs.

7. In view of the order passed in the main matter being Special Civil Application No. 1885 of 2004, no orders are passed on the Civil Applications. They stand disposed of accordingly.

(K.M. MEHTA, J)
(pkn)